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A Descriptive Theory of Justice

LEROY MARCEAU*

For the purposes of a purely descriptive science, it is helpful to conceive of the field of law as determined by the extra-legal matters which law exists to control. There are fundamentally two such matters,—both of them being faculties or aspects of the mind,—conation and affection.[1] For practical purposes it is almost correct to refer to them as the mental aspects of "act" and "sensation." This requires a word of explanation.

Because the individual prefers to experience certain sensations rather than others, he is led to prefer one event rather than another in the world about him. Thus far we have a psychological condition rather than a legal problem. But, in such cases, it frequently happens that a different individual, in the same way, prefers a different event. If the two events are incompatible, the situation involves a corresponding incompatibility between the desires of the two individuals, and may conceivably lead to a conflict in their actions.

It is at this point that the science of law becomes applicable. If there were no conflicts between desires, there could be no occasion for recourse to legal remedies and indeed, as we might easily demonstrate, no conceivable application of legal relations. For such relations merely correlate, and therefore enable us to predict, the results of conflict. With the advent of conflict, therefore, law enters; and it becomes increasingly important as the

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1. While the situation of modern psychology is notoriously confused, it is perhaps fair to state that a majority of students, in that field, continue to go along with Sir William Hamilton in his famous classification of the human mind into three aspects, as follows:

1. The affective aspect, or "wishing"
2. The cognitive aspect, or "knowing"
3. The conative aspect, or "striving."

This classification has, of course, been assailed, and at times very violently, some authorities arguing in effect that the conative aspect (striving) should not be considered as fundamental—that it is simply the resultant of knowing and feeling. Such authorities prefer a division simply into the affective and cognitive aspects. Others believe that the affective aspect (feeling) is not fundamental, but is itself a resultant of knowing and striving. These authorities would prefer a classification confined to the cognitive and conative aspects. Still others, and these perhaps the greater number, argue that, since all three aspects must co-exist, it is meaningless to allege that one is more or less fundamental than another.

possibility of conflict expands. That possibility increases, of course, in proportion to the intensity of the preference in the individual; and that intensity measures the magnitude or amount of the well-being involved.

The subject matter of such a conflict may be almost anything—may be, in truth, the content of any human desire which is intrinsically capable of being affected, either favorably or unfavorably, by the act of another person. The totality of all such things, all that part of external nature as to the control of which individuals are actually (or potentially) in conflict, is denoted by the general term "wealth"—wealth being thus defined as *any* subject of conflict between individuals. But, while such a conflict may arise concerning a variety of abstract or immaterial matters, it will be found convenient for practical purposes, and not at all misleading or inaccurate, to use concrete physical objects, whenever control over them is desired by more than one person, as typical examples of wealth.

The social sciences, such as economics and sociology, use the term "wealth" to describe (1) objects containing qualities which are especially useful in the satisfaction of human desires; that is, are inherently capable of producing pleasant rather than unpleasant sensations, and of thereby raising one's well-being; and (2) objects which persons desire more of than they have. Whenever these two elements co-exist,—a means of satisfying desire, and a condition of scarcity,—wealth exists.[2] It has therefore been defined as "scarce means of satisfying desire." This definition coincides squarely with the one we have adopted in the preceding paragraph for, obviously, human wills never clash over the control of objects which are intrinsically worthless, or so plentiful that every one can have as much as he wants. But, whereas these concepts from the social sciences explain how it comes about that human beings compete for control over these particular objects, jurisprudence simply begins with the competition and declares that, for it, wealth exists whenever individuals are found in conflict.[3]

Historically, it is supposed that the amount of wealth on the earth has greatly expanded, both from the increase in human

2. "These decisions turn on the meanings of property and scarcity. Property in law is scarcity in economics. If any useful object, such as air or water, the most useful of all, is so abundant that there is no competition for its acquisition, then that object does not become property. Rights of property are asserted and adjudicated only in useful objects that are scarce or expected to be scarce." Commons, Law: A Century of Progress (1935) 341.

3. "It is not in respect of every physical object that, at any given time, the law cares to exercise control, and to prescribe rules and conditions of

desire itself and from a progressive scarcity—not that articles have become less numerous, but rather that the increase of population has always outrun the increase in useful objects. It has been pointed out that in a condition of absolute plenty, an earthly paradise, the absence of the scarcity element would completely eliminate the concept of wealth. It is probably true that, in primitive society, food and shelter constituted the sole articles which were both sufficiently useful and sufficiently scarce to be so classed. In a condition of advanced civilization, such as the earth now enjoys, the mounting desires of men and the increasing density of population have made practically everything on earth (except air, sunlight, water and a few other bounties of nature) the objects of competition, and therefore articles of wealth. Thus does the field of law broaden and lengthen out with each succeeding generation.

I

Not to lose ourselves in the contemplation of history, let us return to our thesis that the subject matter of conflict between individuals constitutes economic wealth, and that the task of resolving such conflict is the function of law. This task at the outset appears extraordinarily difficult, since the conflicts which can arise between men are almost infinite, both in complexity and in extent. No two men have the same history, the same natural abilities or the same outlook. The millions of our fellow creatures stand in a myriad differing lights, all changing from day to day, and from hour to hour. The near infinite complexity of phenomena, coupled with the near infinite variety in human beings themselves, seems to carry over into an infinity of sources of conflict between individuals, and so to result in hopeless complexity.

Within the present century, however, a great advance has been made, primarily through the genius of Wesley Hohfeld and Alfred Kocourek. Just as chemistry has succeeded in breaking

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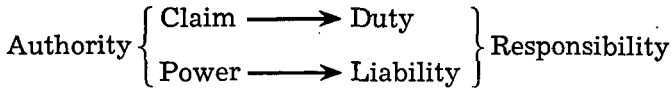
appropriation. The purpose of the law's interference is to arrest interminable competitions, and to promote security by regulating distribution. But it depends upon the actual circumstances of a community, and upon the stage of its social progress, whether certain classes of things are or are not comprehended in the list of things as to which ownership is possible. For instance, in very primitive times, whether the community be pastoral or agricultural, the economical value of land is so extremely small, that it is only when family life has already become highly organized that land is a topic of laws of ownership. Indeed, so long as the population is small, the needs of it limited, and the quantity and choice of land indefinitely large, it is not possible that any idea of appropriation sufficiently fixed to afford a basis for law can, by possibility, exist." Amos, The Science of Law (1896) 162.

down all material substances into ninety-two elements (and ultimately into eight families of elements); so has jurisprudence succeeded in breaking down all possible legal relationship (between individuals) into eight basic forms. The importance of this work taxes the imagination and is only now, a generation after its presentation, coming to be realized throughout the world. In a few brief paragraphs we shall endeavor to describe these basic patterns.

As a preliminary to our understanding of the eight basic legal forms, or "legal relations" as they will hereafter be referred to, observe that no matter what the attendant circumstances may be, *whatever* conflict exists between any two individuals may be resolved in favor of one individual if the other individual *acts* in conformity with his preference. The law may therefore resolve the conflict by *requiring* the one party so to act. For this reason the legal relation between any two individuals can be reduced to one of two positions of dominance enjoyed by the one party. These two positions are respectively (1) the authority of the dominant party to require the other individual to act in accord with the preference of the dominant party, and (2) the authority of the dominant party to control, i.e., to create or to terminate, the foregoing relation.

In proceeding to discuss and to analyze legal relations, we nology the dominant aspect of a legal relationship is called an "authority," and the servient aspect is called a "responsibility." Inasmuch as there are *two* positions of dominance, there are two basic types of "authority" and, therefore, two corresponding types of responsibility. This situation can be graphically depicted by outlining the general authority-responsibility relationship in a diagram, as follows:



The precise meaning of this general relationship, and of the separate relationships into which it may be sub-divided, will now be investigated.

One individual may, and frequently does, "prefer" that some other individual perform a particular (positive or negative) act. In such a case, if the act is, in fact, performed, the individual who preferred it will have his preference satisfied and will thereby receive a certain amount of well-being—over and above the well-being he would have enjoyed without regard to the act.

It sometimes happens (we will hereafter endeavor to learn *when* it happens) that the individual is certain to receive this enhancement in his well-being, either (1) because the act will, in fact, be performed or (2) because, if the act is not performed, in some other way the precise amount of well-being will be shifted from the prospective actor.[4]

Jurisprudence describes this situation by stating that the individual who stands in this fortunate position has "an authority to require" that the act be performed. Hence arises our definition of one of the eight basic legal forms: *a claim is an authority to require an act of another.*

If the situation were to be described from the standpoint of the servient party (the individual who must either perform the act or forfeit a definite amount of well-being [i.e., must suffer pain]) jurisprudence would say that the servient party is under "a responsibility to perform" the act at the behest of the dominant party. This condition is denominated a "duty."[5] Hence arises the definition of the second basic legal form: *a duty is a responsibility to perform an act at the behest of another.*[6]

It is now accepted practice[7] among all authorities on juris-

4. This "shift of well-being" is the ultimate reality upon which law is based; and it, be it observed, is a mental phenomenon. Thus law is essentially a mental, rather than a physical, science.

"There is nothing in law which could be called natural in the sense of existing as a legal phenomenon independently of the emotional human valuation behind it, or absolute in the sense of existing everywhere and always. There is no exterior reality, no absolute fact, no natural relation, which by itself could necessarily enter into the system of the law, or could have any legal significance merely because of its experimental existence, or could become what might be called 'legal reality'." Nekam, Personality Conception of the Legal Entity (1938) 8.

5. In purely theoretical work, where public understanding is not an object of pursuit, it is preferable to designate a servient or correlative relation by a special symbol, rather than by a separate name. For this purpose the mathematical sign of the inverse function "$^{-1}$" is sometimes used. Thus, the correlative of a claim, instead of being called a "duty" is called a "claim^{-1}"; and a liability—which term we will hereafter define—is called a "power^{-1}." In this system the negative relations are indicated by the mathematical sign of negation or falsity "$\sim$." Thus, the absence of a power, now sometimes referred to as a disability, would be called a "$\sim$power."

6. "It may be quickly acknowledged that legal duties are not objective realities in a physical sense. The existence of a legal duty can never be directly and immediately demonstrated. It is purely a mental construct. Its present existence, while never verifiable during its assumed existence is, however, perfectly demonstrated by the regular, though not absolutely constant, phenomena which follow behavior inconsistent with the idea of duty. No other explanation for these phenomena can be given which will meet the test of a strictly scientific procedure." Kocourek, Legal Duties (1939) 13 Temple L.Q. 151, 164.

7. Some writers, however, still speak of the possibility of a duty existing without any corresponding right in another. See Korkunov, General Theory of Law (1922) 211.

"Every right supposes, necessarily, a corresponding obligation. If the

prudence to speak of the "claim-duty" relationship as one indivisible situation.[8] A compound name has been conferred upon the relationship for reasons purely of convenience, since it is helpful to call it a claim when we view it from the standpoint of the dominant party and, conversely, to call it a duty when we view it from the standpoint of the servient party.

In one sense the exact legal status of any individual can be completely described in terms of his claim-duty relationships. For these relationships determine whether, in deciding for or against the commission of any act, he may consult his own preference or must follow the preference of another. But, while such a description would be correct at any given moment, it does not reveal the mechanism by which one's jural status changes from time to time. In order to explain these changes or, in other words, to add a time dimension, it is necessary to supplement the claim-duty relationship by a relationship of a different type.

There are some claim-duty relationships which may be changed by the act of one of the parties; and in such instances it is obvious that the ability to bring about such a change is a new type of dominance which the favored party holds over the other party. This new relationship becomes the third basic legal form, and is denominated a "power."[9] Strictly speaking, a power might be defined as an authority to alter claims, and nothing

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obligation does not exist, there will be only a permission and not a 'right.' But an obligation may sometimes exist without a corresponding right. This happens when the interest which constitutes the subject-matter of the corresponding right arises subsequently to it or is temporarily suspended. Thus the obligation not to assail the right of an unborn child corresponds to no right, since the foetus is not yet a subject of right. The obligation is here created in expectation and by way of protection of the life of the infant to be born."

It is submitted, however, that the obligation not to assail an unborn child may be considered as owed, either to other members of society (such as the parents) or to the foetus; and that in the latter case, although the foetus might have no aid from the state nor any ability in itself to enforce its right, the right would exist and could be defended by a third party.

8. For a continental recognition of this correlation between rights and litigations, see Del Vecchio, The Formal Bases of Law (1921) ¶ 127.

"This correlation, essential to the notion of rights, shows how every right has a corresponding duty." See also Id. at ¶ 129.

9. "Powers, as a matter of fact, take us to a level of legal facts that is exactly one step higher than the one with which we have been dealing. Whether or not an asserted demand-right is to be declared by the court depends on whether certain conditions are present. In most, but not in all cases, one of those conditions is an apparently purposive human act.

"Not all such acts are the exercise of legal powers. It is the task of the court to discriminate those acts in which a legal power was exercised from those in which no power existed." Radin, A Restatement of Hohfeld (1938) 51 Harv. L. Rev. 1141, 1157. Quoted in Hall, Readings in Jurisprudence (1938) 508.

else. Then we would encounter the necessity of describing in some way the ability to alter powers. This ability might be called a "power of the second order." We might then describe the ability to alter a power of the second order as "a power of the third order," and so on without end. Such a terminology would be logical and would have certain theoretical advantages; but it would be far more complicated than the present development of jurisprudence seems to warrant. In the interest of simplicity, therefore, and following the uniform course of modern authority, we use the word power to cover all of these situations, i.e., the ability to alter a claim, a power, a power over a power, etc. This usage gives rise to the established definition: *a power is an authority to alter the relation of another.*

When this new relationship is viewed from the standpoint of the other party, it is called a "liability."[10] We can readily cast this into the form of a definition by stating that *a liability is a responsibility to suffer an alteration of one's relation.*[11]

Legal relationships of any kind, like other phenomena in our universe, are found by experience to fall naturally into a relatively small number of classes or types, all of the relationships in a given class being of the same, or nearly the same, general form. Thus, many of the relationships encountered in every day life are similar, one with another, except that they run between different pairs of individuals, the individual claimants and duty-owers being dissimilar, but the relationships which unite them being identical. Whenever we encounter a form of relationship which is common to *every* member of an entire class of individuals, we describe it as a law—thus implicitly defining a law[12] as *a relationship which is common to an entire class of individuals.*[13]

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10. Some authorities, notably Salmond, have supposed liability to be the correlative of privilege, rather than of power. But this view has been exploded by the investigations of Hohfeld.

See Campbell, Some Footnotes to Salmond's Jurisprudence (1941) 209.

11. Some authorities argue that a liability can exist without any corresponding power. They point out that a personal property claim, for example, will be terminated if the object is destroyed by natural force rather than by human act. The owner of such an object can therefore be said to be under a "liability," although no person has a "power."

Campbell, op. cit. supra note 10, at 209.

It is submitted that this is purely a question of definition.

12. The definitions usually adopted are varied and, in some cases, grandiose.

It is really remarkable that the following should all be offered as definitions of law. Apparently jurists and philosophers reserve the right to give words any meaning they choose. Thus:

Demosthenes: "That is law, which all men ought to obey for many reasons, and especially because every law is an invention and gift of the

Although this meaning of the word "law" may, on first consideration, seem unusual if not strained, a familiar example will reveal that it is in fact the meaning which we uniformly, if unconsciously, employ in every-day speech. We might say, for instance, that John Wilkes Booth was under a duty to refrain from killing Abraham Lincoln, and that Lincoln had a claim which entitled him to require Booth to refrain. This is to state a simple claim-duty relationship. But this relationship was not peculiar to Booth and Lincoln. Other men similarly were and are under duties to refrain from killing their fellow-men. We can, therefore, generalize the situation by grouping in one class all relationships which contain the common concept, a duty on the part of one man to refrain from killing another. In the stark, descriptive language of statutory law, the concept common to this class of relationships is expressed directly by saying that "Whoever kills his fellow-man will be hanged." In the language of jural relationship, it is expressed indirectly by saying that "Every person is under a duty to refrain from killing any other person." In the terse, classic language of scripture it assumes its simplest form: "Thou shalt not kill."

Gods, a resolution of wise men, a corrective of errors intentional and unintentional, a compact of the whole state, according to which all men who belong to the state ought to live."

Cicero: "Law is the highest reason implanted in nature, which prescribes those things which ought to be done, and forbids the contrary."

Hooker: "A Law is properly that which Reason in such sort defineth to be good that it must be done."

Grotius: "A rule of moral action obliging to that which is right."

Blackstone: "A rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong."

Amos: "A command proceeding from the supreme political authority of a state and addressed to the persons who are the subjects of that authority."

Jhering: "The sum of the rules of constraint which obtain in a state."

Gareis: "Law in the objective sense of the term is a peaceable ordering of the external relations of men and their relations to each other."

Tolstoi: "Rules established by men who have control of organized power and which are enforced against the recalcitrant by the lash, prison, and even murder."

Russian Penal Code, Article 590: "Law is a system of social relationships which serves the interests of the ruling classes and hence is supported by their organized power, the state."

Seagle, The Quest for Law (1941) 4.

13. Note that even the most pronounced positivists describe law as a general rule which may be and is frequently "broken." They conceive of the law as the "announced purpose" of the state, rather than as a uniformity in its actual conduct. Thus obsolete statutes are regarded as "laws" even though they are never enforced.

It is submitted that it would be more in keeping with the practice in the physical sciences if we were to define law in terms of the uniformity which actually does exist, rather than that which the state announces its intent to sanction. Nothing less than this deserves the name of realism.

Of course, an actual occurrence (an event) in either physical or legal science must be considered as the resultant of many laws; and cannot be

II

Under our definition of a claim-duty, such a relationship exists whenever a proposed act (i.e., a proposed exercise of volition) will be followed by a certain shift of well-being[14] (i.e., a certain satisfaction of preference to be enjoyed by the individual holding the claim rather than by the actor owing the duty). When the situation is such that this shift will actually occur, the claim-duty exists whether or not the situation is *known*. But if the relationship is to serve as a guide to action, it must be known to the actor, not after the shift of well-being occurs, but rather before its occurrence at the time that the act is contemplated and committed. This implies knowledge of a future event and therefore, as we learn from natural science, is only possible if, in addition to knowing the present situation, the actor knows a natural correlation or "law of nature" which unites the present situation with the future.

Examples of this truth are, of course, innumerable in natural science. The man who drops a stone knows that it will fall, but only because, while unaware of the precise formulation, he is familiar with the substance of the law of gravity. The man who inflates a pneumatic tire knows that the pressure will increase and that heat will be generated, but only because he is familiar with the substance of Boyle's law and of Charles' law: And so we might continue through countless hundreds of laws of nature which enable us, upon the basis of present facts, to predict future phenomena.

An exact knowledge of the correlation between the commission of an act (conation) and the well-being of actor and actee[15] (affection) would, in the same way, enable one to predict precisely how well-being would shift, upon the performance of a given act: And this would determine whether or not a duty (not

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adequately described in terms of any one law. Newton's First Law of Motion, for example, states that "every body remains in a state of rest or of uniform motion in a straight line unless it is compelled by impressed force to change that state." This does not suffice to describe the actual movement of *any* body whatever, since all are acted upon by impressed forces. But it is nonetheless true of *all* bodies and, in connection with other laws equally operative, describes their movements with increasing accuracy.

14. If the shift is brought about by the state, the claim is called a positive or jural claim; if the shift is brought about by nature generally, the claim is called a natural claim. This is believed to be the sole basis of distinction. Marceau, The Relation of Natural to Positive Law (1942) 18 Notre Dame Lawyer 22.

15. This is the simplest word available to describe the individual who is affected by the act.

to perform the act) existed. From this point of view the task of the jurist appears relatively simple—a mere matter of applying the correlation to present fact situations.

The history of jurisprudence, however, has not developed along these lines. It was one time customary in discussions of legal philosophy to deny that any such correlation between conation and affection existed; and to speak of the search for such a correlation as the pursuit of fantasy. During the last century, however, it has become increasingly clear that not only conation and affection, but *any* phenomena whatever, may be correlated; because such correlation is merely an abstract and generalized description of the sequence, whatever it may be, in which the events follow one another.[16] Where it is possible to make our generalizations very broad, they can be stated very simply and made to assume the form of a fundamental law—usually a differential equation. When it is not possible to make our generalizations very broad, they must be stated with much greater complexity, and are frequently so complicated that they cannot, in practice, be stated at all. But in either event they exist. It is, therefore, no longer possible to deny that a correlation, such as we have in contemplation, must be available.

Inasmuch as all minds are essentially alike, it is ordinarily assumed that this correlation, whatever it may be, is common to all minds or, at least, to all minds of a certain class. It therefore exists not only between one individual actor and the person affected by his particular act, but exists rather between a whole class of actors, on the one hand, and, on the other, the class of person affected. The claim-duty relationships which such a correlation indicates are therefore common to an entire class of persons and constitute, within our usual definition, "laws."

The existence of such "laws," however, has not quieted the fears of those who doubt the feasibility of calculating legal relations by scientific means. The successors of those who formerly denied the existence of a correlation between conation and affection now deny that the existing correlation can be *known*. They argue that the extreme complexity of social, as contrasted with material, phenomena makes it impossible for the individual, or even the race, to formulate the correlation in comprehensible terms. Limitations in the ability of the human mind, therefore,

16. It is universally *assumed* that they will continue to follow one another, on the same sequence, hereafter. This assumption has been, of course, the subject of a celebrated controversy since the time of David Hume.

rather than anything in the nature of the phenomena themselves, are said to make impractical a true science of law.

In its extreme form, this view is not seriously championed except as an intellectual pastime. It is quite obvious that men, when acting, do have (at least on some occasions) a fairly accurate idea of the effect which the act will have on their own future well-being; so much so, in fact, that one who acted without reference to the future would be considered abnormal. And because no such idea could exist without a knowledge, to some extent, of the correlation between conation and affection, it is clear that men do have such a knowledge. The fact that men, by their actions, sometimes bring down unexpected ruin on their own heads is, of course, proof that their knowledge is partial rather than complete. So much is clear.

It has therefore become customary for modern authorities to agree that something is known about the correlation between the commission of an act and the well-being of the actor; and that one factor in this correlation, known at the present time, is the correlation set forth in the statutes and customs of the State which describe the circumstances under which the public force will be brought to bear to impose damages upon men who commit certain acts and to award compensation to those who are injured by the acts in question.

Such an announced intention, forcibly to produce a shift of well-being, indicates a probability that well-being will shift, and therefore, indicates the probable existence of a claim-duty relationship. Because the shift is to be produced by the state, rather than by some other part of nature, it is customary to call the relationship (if it exists) "positive" or "jural."

Now there are many who believe that the announced intention of the state is the *only* part of the correlation, between conation and affection, which is sufficiently simple to be known with any high degree of precision. They therefore conclude that, while positive law undoubtedly exists, natural law (for finite minds at least) does not exist. They believe that those who have the opportunity to shape the positive law may shape it arbitrarily; that the shifts of well-being which they decree, whatever they may be, will not thereafter be undone or reversed by any natural invariant; and that there is accordingly no standard to which the positive law, in order to accomplish the purpose of its promulgators, need conform.

There are, on the other hand, those who believe that the entire correlation between conation and affection can be stated—

at least approximately—in simple terms, and known by the average actor. They, therefore, conclude that positive law and natural law co-exist. They believe that, if the positive law attempts to shift well-being in a manner inconsistent with the natural correlation, the attempt will ultimately prove unsuccessful; and that, in this sense, the natural law is a standard to which the positive law must conform.

We are thus faced with a clear cut issue. Is there or is there not, a simple correlation between conation and affection? As philosophers divide on this issue, each of the two conflicting contentions is supported by authorities of world-shaking reputation. Like so many of the fundamental conflicts in cosmology, the matter is debated with deep feeling and at times with expressions not the most indulgent or considerate. Those who believe that the correlation is complex are described at times as "give it up" philosophers and at other times as "corrupters of the fountain of knowledge." Those who believe that the correlation is simple are condescendingly described as "naive" or as the "followers of an illusion."

III

To the author of the article, all of this heat seems premature. It appears that the conflict should be settled, as most issues in science are settled, by a careful formulation of the problem and an equally careful investigation into the facts. We should first of all have clearly in mind the precise form of the correlation under discussion; we should then tabulate the legal relations which follow from it; and finally, we should proceed empirically to test whether these relations square with the facts revealed by experience. Space will not permit us, in this article, to consider *all* proposed formulations of the correlation; but we shall endeavor to discuss the possibility of a scientific approach in connection with *one* of the many forms in which philosophers have expressed it.

It has been suggested that affection is proportional to conation in the sense that the amount of well-being enjoyed by an individual (through the satisfaction of his preferences) is directly proportional to the amount of the effort exerted by him (through the exercise of his volitions); just as acceleration, in mechanics, is proportional to impressed force. This is to postulate, in the field of mental phenomena, a correlation similar to that which Newton postulated, by his second law of motion, in the field of physical phenomena. For the purpose of this article, this postu-

late may be considered as representative of the view of all those who believe that a simple correlation exists. It is substantially the view taken by the great religions, and by philosophers of such divergent outlook as Aristotle, Spinoza and Emerson.

Stating the postulate in terms of "act" rather than the more general concept "conation," it asserts that every actor will receive a (positive or negative) amount of well-being proportionate to his exertions; and it provides that every actee will forfeit a (positive or negative) amount of well-being equivalent to the amount received in any other fashion.[17] From the postulate we can therefore deduce when well-being will be forfeited by the actor and when it will be acquired by the actee. The co-existence of these two conditions by definition *constitutes* a claim-duty relationship. In the following paragraph we will try to discover the circumstances in which this condition exists.

Unlike the historian of a fixed period, the scientist cannot "begin at the beginning." He must study phenomena as he finds them after they have been subjected to countless influences and counter-influences. He therefore adopts the next best method—he attempts to study a phenomenon in the simplest form, abstracting from it as many complications as possible and reserving them for later study so that one thing may be studied at a time. With a similar goal we shall attempt to study the relations which *would* exist (assuming the truth of the postulate) between individuals in a situation simplified by the following provisions:

1. That no state is in existence.
2. That the status of each individual is in equilibrium (i.e., he could look forward to neither increase or decrease in his well-being if the proposed act were not performed).

17. The relation between act and responsibility is so natural that, as John Dewey has shown, naive persons can't conceive of any other basis.

"In short, in substance although not in form, the reasonable or 'natural' was identified with the antecedently given, with the state of affairs that customarily obtained, not with the exercise of intelligence to correct defects and to bring about better consequences . . .

"It would not be difficult to trace the same logic in the denial of the principle of liability without fault. Under certain conditions, the doctrine is doubtless reasonable, in the sense in which reasonable means due foresight of consequences. Under other conditions, where industrial pursuits bring about different consequences, the doctrine that in pure accident of misadventure it is reasonable for the loss to lie where it falls, is, when laid down as a dogma, the deliberate identification of the reasonable with the physically existent, and willful refusal to use intelligence in such a way as to ameliorate the impact of disadvantage."

Dewey, Nature and Reason in Law (1931). Quoted by Jerome Hall, op. cit. supra note 9, at 234.

3. That the effect of the proposed act is completely foreseen by the actor.

These three conditions are all contrary to fact, and therefore the result which we obtain in this preliminary study will not immediately reflect the existing relations which we might expect to meet with in everyday life. In order to present this study in the most persuasive fashion, it would be necessary to correct these results by considering the modifications which are introduced by each of the three foregoing factors. But the digression, interesting and fruitful though it should prove, would not contribute greatly to the thesis here being developed. Rather than devote space to what is essentially a refinement, it appears wiser to leave our results incomplete, and open to the invidious description "theoretical."

At an earlier period in the history of jurisprudence it was customary to cast doubt upon this method of proceeding, and to insist that man, being naturally a social animal and attended everywhere with a degree of organization (such as is implied by the existence of the state), could not properly be studied in any simpler condition without doing violence to the actual facts.[18] This attitude was perhaps a reaction against the extremists of an earlier period who had implied, or were commonly supposed to have implied, that these simpler conditions of human relationship (particularly the condition of men prior to the formation of states and communities) have had a real existence in historic or prehistoric times. In the present discussion, of course, we will consider these simpler patterns of relationship from a purely analytical standpoint, without regard to the question of their actual existence, or non-existence, as any golden period of the past or future.

It is hardly necessary to attempt a justification for proceeding in this way, so familiar is the method in the natural sciences. The first principles of every such science must be expressed in terms of certain ideal conditions, never met with in experience and only approximated in the laboratory. It is probably true, for example, that no actual "body at rest" exists or ever has existed

18. The following quotation is typical of this viewpoint.
"There have been societies of men since the beginning of the existence of man. To think of man isolated is to think a thing which does not exist, and which the facts prove never to have existed. Therefore the idea of the social man is the only possible starting point of juridicial doctrine.
"Consequently, if we suppose the natural man isolated, he cannot have any rights." Duguit, The Law and the State (1917) 31 Harv. L. Rev. 1, quoted in Hall, op. cit. supra note 9, at 200.

in any section of the universe: And yet Newton found it advisable to express his famous laws of motion in terms of such an imaginary "body at rest;" just as he expressed the law of gravitation in terms of the relation which would exist between two material bodies, if no former acceleration, no friction, no third body and (what amounts to about the same thing) no space curvature existed. The results which he obtained, by the application of the law, were then corrected by considering in turn the effect of past acceleration, friction, third bodies and (in our time) space curvature. A method which proved so productive, in explaining the relationship between the physical aspect (or mass) of two bodies, merits our consideration in the study of the relationship existing between the mental aspect (or minds) of individuals.

Let us proceed then to consider the case of two individuals in what may be called their "normal" positions, before either has, by his actions, acquired any expectation of receiving pleasure or pain. The postulate leads us to believe that each will thereafter receive an amount of well-being proportionate to his own exertion, and that he will not receive any well-being (positive or negative) apart from his exertion.

Suppose, in this situation, that one individual in accordance with his own preference performs an act and thereby produces an effect *upon the person of the other*, against the will (i.e., preference) of the other. Very clearly, in such case, the act results in an immediate enhancement of the actor's well-being, a sensation of pleasure; and an immediate diminution of well-being, or sensation of pain, in the other person. This, in the popular language of the day, is usually called an "injury." Under the postulate, the actee or injured party can look forward to receiving an amount of well-being which will exactly compensate him for his pain; and the actor, having received an advantage, not called for by the postulate, must in the future suffer an equivalent loss. There will be, in other words, a future "shift" of well-being from the actor to the injured party.

But this shift of well-being is precisely the criterion which we have adopted, in our definition, to identify the claim-duty relationship. We may therefore describe the situation in terms of relations by saying that the one individual has *a claim to exclude the other from affecting his person.*[19] When this relation-

19. This is the philosophical basis of the argument that slavery, for example, is always "unjust." Those who dispute this basis ordinarily argue that slavery, or anything else, may, under certain conditions be entirely just.

ship is viewed from the standpoint of the other individual, and thus transposed into terms of duty, we may say that the other individual has a duty to refrain[20] from affecting the person of the one.[21]

The foregoing claim-duty relationship covers only the person[22] of the claimant and does not extend to any other object;

"Nothing could be more preposterous, for instance, than to say: at no stage of human culture has slavery been just. This is the result of the retrograde movement from the historical basis of Hegel back to the non-historical exposition of Natural Law of Kant. This whole school of thought, including Neo-Kantianism, may well be buried and forgotten." Kohler, Philosophy of Law, 26.

20. Some authorities would so define duty as to exclude all duties *to refrain from acting,* and would include only positive duties to act—to redress an injury already inflicted.

"Hence, a claim requires a special relation which has been brought about as regards this person by virtue of a legal process (Rechtsvorgang). Only if thus understood is the conception of the claim productive; only thus does it aid in clarifying the theory of the law.

"2. At the present time, it is, indeed, grossly misunderstood, and no other term has been more misinterpreted. Most misleading of all are the following errors:

"(a) The belief that an owner has a 'universal claim' against everyone 'not to be molested.' This is the most unproductive idea possible; a legal significance attaches in granting a claim when someone has been injured, a claim that the disturbance cease; but as long as one has not been molested, he must in turn leave the world unmolested, and the idea of a claim against an innocent passerby who has not disturbed one at all is monstrous." Id. at 84.

It is submitted that duties could be defined in either way we choose, and that the decision between alternative definitions is largely a matter of convenience. We see no particular convenience in the qualification Kohler suggests.

21. For a scholarly discussion of the philosophical basis of these relations, expressed however without the precision made possible by Kocourek's terminology, see Del Vecchio, op. cit. supra note 8, at ¶ 174.

"Law, as well as morals, has its principle in the nature or essence of man. It is distinct from the latter, and constitutes a specific criterion of the valuation and determination of acts, by the objectivity of the relation in which it places and protects the absolute quality of personality. The possibility, proper to man, of living in a supra-sensible universe, and attaining, in his consciousness of an absolute being, the reason of his deliberations (a possibility which we have recognized as the basis of ethics in general), acquires a specific juridical meaning when it appears as the criterion and rule of all social relations. In this sense it is advanced as the maxim that every man can, merely because he is man, advance a claim not to be forced against his will into any relation with another. He can advance a claim not to be used by anyone merely as a means or instrument. He can demand respect, as he must give respect in return to the imperative: 'Do not extend your caprice over others, do not aim to subject to yourself those who are subject to themselves alone.' By this principle or idea-limit, of the properly universal law of personality, fixed and inexhaustible in every concrete relation of society, all social relations must be measured and made, so that each one of them, of whatsoever kind it may be, will bear its impress and will presuppose and imply the recognition of the high worth of autonomous being, of which it must be in fact an exercise or function."

22. See Korkunor, op. cit. supra note 7, at 220.

"The modern idea of right does not, however, admit the existence of rights over the very person of a man. It admits only the existence of rights to his services, and even these rights have very frequently no absolute character."

for inasmuch as the person alone is capable of preference between feelings (that is, of pleasure or pain), only by an effect upon the person can pain be inflicted; and only when pain is inflicted can a shift of well-being be predicted. Between persons of "normal" status, therefore, there is no claim, on the part of either, to exclude the other from external objects: And it might appear that we could draw a sharp line, saying that one's claim extends to all acts affecting his own person and does not extend to any acts affecting other things.

Theoretically this is true, and practically it is acceptable in the great majority of instances. But it is not as rigorous as it may seem; for inasmuch as the "person" is casually connected with external "effects," every act which produces an effect upon an external object must inevitably produce at least a slight effect upon the person of the other individual. It could therefore be argued that a claim to exclude another from affecting one's person is, in effect, a claim to exclude him from performing any act whatsoever. An adequate answer to this difficulty would require a separate article. For our present purposes, it must suffice to point out that such effects are almost always negligible.

Under the ideal condition which we are now considering, each individual has one claim, and only one—a claim to exclude the other individual from in any way affecting him. Since this claim, and the absence of every other type of claim, is implicit in the fact that the status of each individual is "normal" (in the sense that no increase or decrease in well-being can be expected) it can be changed only by a change in the condition of one or both individuals. It will be changed if either individual brings about a change in his status either by (1) the exercise of a volition, or (2) the enjoyment of a preference. We will here consider the alterations which come about by the exercise of volition.

The exercise of volition is, in every instance, the performance of an act; and under the postulate an act may alter the status of the actor so as to assure him of an increased measure either of pleasure or of pain. In this way it may alter his relations. Very clearly, there is no *other* way in which the individual may exercise control over a relationship. In the everyday language of our jurists, and even of our jural scholars, we find powers referred to as though they were instruments of control over the law itself, enabling the holder of the power to alter relations by a purely mental determination. This belief, although harmless enough, is based on a misconception. All that the individual can ever do is to perform acts, and thus produce changes in the ex-

ternal world. After he has done so, some law, either an invarient principle such as we have postulated, or one of the uniformities imposed by the positive law, determines what the effect will be upon relations.

The basic power of the individual may be stated, therefore, as a power to perform acts. By the use of the table in Part I, we see that the other individual must be under a correlative liability to suffer (or submit to) acts: And indeed it is not difficult to observe independently that the actee is under a liability, inasmuch as he must run the risk of having others injure him or aid him by their acts, thus altering his status and relations. Just as a claim to exclude others (from affecting one) is the only claim which exists under the ideal condition here postulated, so the power to perform acts is the only power. While our analysis has referred to the power *over the claim relation*, or a power of the first degree, it is not difficult to see that it is equally applicable to powers of a higher degree, i.e., to powers over the power relation itself.

It may here be helpful to tabulate the basic relations which we have thus far evolved.

Each individual has the following authorities	A claim to exclude the other from affecting one's person	⟶	A duty to refrain from affecting the other's person	Each individual has the preceding responsibilities
	A power to perform acts	⟶	A liability to suffer acts	

The effect of an act is in every case a difference between two conditions of the universe—the condition which does exist, when the act is performed, and the condition which would exist if the act were not performed. Expressed in another way, the effect of an act is to create certain qualities (those which would not exist but for it) and to destroy other qualities (those which would exist but for it). Purely for purposes of illustration we will discuss the situation which attends the creation of a group of qualities sufficiently tangible to be called a concrete "object."[23]

23. The creation of objects, by one person, is rare; and this has caused some authorities to belittle the value of the principle here discussed.

"The right to appropriate what one has discovered is obviously of very limited application in modern life; and the right to the full produce of one's

The creation, or production, of an object always requires the expenditure of a certain amount of exertion and therefore, if the postulate be true, always assures the producer of receiving a proportionate enhancement in his well-being. If, therefore, the producer uses the object in accordance with his own preference, and thereby receives an enhancement in well-being, the expected has happened and no repercussions are to be anticipated. On the other hand, if a different individual, ignoring the wishes (preference) of the producer, uses the object for his own purposes, the pleasure he receives is uncalled for and will be compensated by a corresponding diminution in his well-being at some future time; and in such an event the producer, not having received the enhancement in well-being of which his exertions assure him, will receive it at some future time.[24] In other words, there will be, at some future time, a shift of well-being from the party using the object to the producer.

Inasmuch as this shift of well-being, from the user of the object to the producer, is the criterion by which we recognize the existence of a claim, we can describe the situation in the language of relations by stating that the producer has a claim to exclude others from using (or in any other way affecting) the object he produces. It would not be very difficult to show that this claim exists, not only in the case of objects, but in the case of every quality which is produced; although it is not of much consequence except in the case of qualities which constitute wealth and have value.[25] For this reason it is customary to

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labor is practically meaningless in a society where the division of labor is so complex that no one is ever in a position to tell what part of any objects or contests a single individual could have produced or invented by his own unaided labor." Cohen, Law and the Social Order (1933) 344.

Again, at page 51 of the same volume, Mr. Cohen states: "That everyone is entitled to the full produce of his labor is assumed as self-evident, both by socialists and by conservatives who believe that capital is the result of the savings of labor. However, as economic goods are never the result of any one man's unaided labor, our maxim is altogether inapplicable. How shall we determine what part of the value of a table should belong to the carpenter, to the lumber man, to the transport worker, to the policeman who guarded the place while the work was being done, and to the indefinitely large numbers of others whose cooperation was necessary."

The answer, of course, is that *by contract* each craftsman sells, in exchange for a daily wage, the claim he would otherwise have over the quality he produces.

24. "The person is inviolable; and it alone is inviolable. It is inviolable not only in the intimate sanctuary of consciousness, but in all its legitimate manifestations, in its acts, in the product of its acts, even in the instruments that it makes its own by using them. Therein is the foundation of the sanctity of property." Fourteenth lecture in Cousin, The True, the Beautiful and the Good (1854).

25. "In the acquisition of ownership, the principle follows of itself, that if a man has put his work into a natural product, by transferring it from the

describe the claim in general language by stating that the individual[26] has *a claim to exclude*[27] *others from his property.*[28] The same relationship, viewed from the standpoint of the duty, may be described as *a duty to refrain from affecting the property of another.*

In the preceding paragraphs we considered the qualities which are *produced* by an act. Let us now turn to the qualities which are *destroyed*—the qualities which would exist but for the act. Here, too, our inquiry can be best illustrated by considering the situation which attends the destruction of a group of qualities sufficiently tangible to be called a concrete "object."

The destruction of an object (the destructive "phase" of an act) has been described as "the creation of nothing out of something." It begins with an object and ends with nothing at all—nothing which can be the subject matter of a relation. If the object destroyed was not subject to the claim of another then, when it is subjected to the preference of the actor by its destruction, there is no one who has been injured—no one to whom well-being will flow. Therefore, by definition, there is no viola-

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world of nature to the world of universal human control, or by otherwise increasing its usefulness, and intensifying its character as wealth, he can demand that his relation to it should be nearer than that of others, because he has put a part of his personality into it, and thus given it something of himself.

"From this there follows the justification of acquisition of ownership by taking possession, and by improvement, the principle being upheld that it is not the amount of work that is of importance, but the usefulness resulting from the work, that is, that the thing is made susceptible of human interests, with greater or lesser advantages." Kohler, op. cit. supra note 19, at 128.

26. "It is not property in itself that has rights; it is the proprietor, it is the person that stamps upon it, with its own character, its right and its title." Fourteenth lecture by Cousin, op. cit. supra note 24.

27. The *physical ability* to exclude others (i. e., to enforce the claim) is the corporeal element of "possession," although the idea of possession has been modified to some extent by convention.

"To be the possessor of an object a man must have it so far under his control as to be able to exclude others from it, but for this purpose there is no need of actual contact. A soldier lying on the ground, with his rifle within easy reach of him is in possession of the rifle. The purchaser of a quantity of wheat is put into possession of it by being given the keys of the warehouse in which it is stored, and the donee of an estate may take possession of the whole by entering upon any one portion of it, or even by having the land shown to him from some neighbouring point of view. A long succession of writers has maintained that the possession in these cases is symbolical, or fictitious, because acquired without contact; that the 'claves horrei' are, for instance, a mere symbol of the warehouse and its contents. The error of attributing this view to the Roman jurists was conclusively shown by Savigny; and it obviously need never be resorted to if we accept, as the corporeal element in possession, the power to exclude others from the use of a thing, rather than any actual contact with it." Holland, The Elements of Jurisprudence (1880) 124.

28. The word "property" is used in its popular sense as describing wealth which the individual produces or acquires, as we shall see in Part IV, from some other individual who has produced it.

tion of a claim. For this reason we say the destruction of an object (or, generally, the destruction of any quality) has no legal consequence if the object is not subject to the claim of another.

But, if the object destroyed is subject to the claim of another (i. e., is his "property") the case is otherwise. The creator of the object suffers an unwarranted decrease[29] in well-being when he is deprived of the use of the object; and the one who destroys the object, by subjecting it to his own preference, has enjoyed an unwarranted enhancement of well-being. A shift of well-being must therefore be expected. If this shift of well-being is made voluntarily by the actor, as by compensating the creator of the object, no further repercussions need be expected: But if it is not made voluntarily, and if the postulate be true, it must nonetheless occur. For this reason it is proper to say that the actor has a duty to make compensation. In more general language, we may say that the individual is under *a duty to make others whole for any violation of their claims.* The same relationship, viewed from the standpoint of the creator of the object, may be described as *a claim to be made whole for any violation of one's claim.*[30]

We are now in a position to elaborate our original statement of the claim-duty relationship by incorporating the changes which are introduced by the exercise of the "power to perform acts." The result may be set forth in tabular form as follows:

Each individual has the following claims	1. To exclude the other from affecting one's person or property	→	1. To refrain from affecting the person or property of the other
	2. To be made whole for any violation of one's claim	→	2. To make the other whole for any violation of his claim

Each individual has the preceding duties

29. That is, a decrease not inferrable from the postulate.

30. This claim is often contrasted with the "claim to exclude" which some authorities believe to be more "original."

"The two rights mentioned are essential to each other, and condition each other. No transmuted or new right could arise unless there had been an 'original' one; and the test of the existence of the 'original' one is the willingness of the court to transmute it into a new one. This fact, and the essential difference in content between the two, are important elements in the Hohfeldian system." Radin, supra note 9, at 1153. Quoted in Hall, op. cit. supra note 9, at 506.

The foregoing table shows what might be called the basic claim-duty relationship existing between two individuals. The entire jural picture from the standpoint of the one individual, including both powers and claims, can be depicted succinctly (and without detail) as follows:

Authorities	Claim	To exclude others	
		To be made whole	
	Power	To create conditions	
		To destroy conditions	

It is not difficult to observe the symmetry of this system. The exercise of a "power to create" may bring about a "claim to exclude" or terminate a "duty to make whole." The exercise of a "power to destroy," may conversely bring about a "duty to make whole" or terminate a "claim to exclude."

IV

It sometimes happens that the holder of a legal relation, positive or negative, represents to another person that *if* such other person does as the holder wishes (i. e., acts in accordance with the holder's preference, in a certain particular) *then* the relation will not be exercised. A landlord, for example, may state that he will not eject a delinquent tenant if he makes good the rent. Such a representation is frequently made (by the holder of a relation) in order to induce the other person so to act; and not infrequently it is successful in inducing the action. When successful, it increases the well-being of the holder of the relation (because it causes his preference to be satisfied) and it decreases the well-being of the other person[31] (because it causes him to act in accordance, not with his own preference, but with the preference of another—the holder of the relation).

31. The earlier scholars seemed to stress "reliance" a great deal more than "injury," perhaps because disputes never arise in which injury is not present. See, for example, 3 John Austin, Lectures on Jurisprudence (1863) 128.

"*Why a promise is binding* (abstraction made of the interest of third parties). It binds, on account of the expectation excited in the promisee. For which reason a mere policitation (that is, a promise made but not accepted) is not binding; for a promise not accepted could excite no anticipation. So of a promise obviously made in jest."

In the following paragraphs we will explore the implications of this matter[32] while confining our attention, in the interest of simplicity, to the situation which exists when these two quantities of well-being are approximately equal; that is, to the case where the holder of the relation, by inducing the performance of the act, will receive about the same amount of pleasure as the other person will receive by virtue of the fact that the relation is not exercised. Put more simply, although with less rigor, it is the situation which exists when the relation in question, and the act induced, are substantially equal in value.

This is the situation which prevails in the great majority of instances; for, if the relation were substantially more valuable than the act, the holder would not be willing to forego exercising it; and, if the act were substantially more valuable, it could not be induced. Instances do occur when these values are not equal, or even comparable, but such cases are less convenient for study since they introduce awkward perturbations without adding anything whatever to the discussion which will here follow.

Assuming therefore, that the relation and the act are roughly on equal value, let us consider the situation which exists when a claimant has represented that his claim will not be exercised and the duty-ower, by means of this representation, has been induced to act. What will happen thereafter if the claimant attempts to exercise his claim (by requiring the performance of whatever act it concerns) and the duty-ower, by refusing so to act, violates the claim?

The claimant would ordinarily be assured of receiving a certain amount of well-being by virtue of his claim and therefore, if the claim were violated under ordinary circumstances, could look forward to receiving some future enhancement in well-being. But here he has already received an equivalent amount of well-being by virtue of the act which he induced the duty-ower to perform. His status after the violation is therefore what we might call "normal." The duty-ower, in like manner, upon violating the relation, would ordinarily look forward to a

32. The philosophical basis of transfer or "contract" (the form in which the idea is ordinarily encountered) is much more complicated than the everyday rule of positive law under which a promise is simply and categorically enforced without much reference to inducement, shift of well-being, etc. This convenient rule of positive law is, however, a rule of thumb adopted late in the history of civilization in order to facilitate the trade structure of a developing world. Even today it is less precise than we usually suppose. Consider, for example, the way the doctrine of "consideration" has been evolved in order to invalidate attempted transfers in which no real modification of the party's station occur.

certain decrease in his well-being. But here he has already suffered an equivalent decrease by virtue of the act which he was induced to perform. Thus his well-being, too, is now "normal." Since the status of each person is normal, there will be no shift of well-being from the duty-ower to the claimant and therefore, as our definition of claim will verify, there is no claim in existence. It disappeared upon the performance the act which had been induced.

In order to describe this situation, without setting forth the complexities inherent in it, it is customary to resort to figurative language and to say that the original claim has been "relinquished" by the holder. It will be immediately obvious that there is no corresponding way in which a duty can be relinquished.

Repeating our assumption that the relations and the act are roughly of equal value, let us turn now to the situation which exists when an individual who is not under a duty has represented that his privilege[33] to act as he pleases will not be exercised (that is, that he will act in accordance with the preference of the other party) and the other party, the holder of no claim, by means of this representation has been induced to act. What will happen thereafter if the individual making the representation attempts to exercise his privilege (by acting in accordance with his own preference rather than the preference of the other party) and the person induced by the representation, by attempting to require a different action, expresses his disapproval.

The holder of the privilege would ordinarily be exempt from the necessity of performing any particular act at the behest of the other party, and therefore, if he had acted in accordance with his own preference, under ordinary circumstances, would not have to look forward to any particular shift in well-being. But here he has already received an amount of well-being equivalent in value to his privilege by virtue of the act which he induced the duty-ower to perform. When, therefore, he proceeds to exercise his privilege, he is receiving an additional enhancement in his well-being beyond the amount indicated by the postulate. The person induced by the representation, in like manner, upon the exercise of the privilege by the other party, would ordinarily look forward to a certain decrease in his well-being. But here he has already suffered an equivalent decrease by virtue of the act which he was induced to perform;

33. "Privilege" is the word ordinarily used to describe the non-existence of a duty.

so that, upon the exercise of the privilege, his well-being is decreased beyond the point which would be indicated by the postulate. Since the exercise of the privilege will leave the well-being of the holder of the privilege higher than it should be, and will leave, the well-being of the person induced lower than it should be, there will be a shift of well-being from the holder of the privilege to the person induced; and therefore, as our definition will verify, there is a claim-duty in existence.

In order to describe this situation, without setting forth the complexities inherent in it, it is customary to resort to figurative language and to say that the original privilege has been "relinquished" by the holder.[34] This is, of course, exactly the same as to say that a claim has been "conferred" upon the other party. It will be immediately obvious that there is no corresponding way in which a duty can be conferred.

In the preceding discussion we have used the word "relinquishment" to describe the process by which an existing claim (in one's favor) is terminated, and we have used the word "conferment" to describe the process by which a claim (against one) is brought into being. While it is important to preserve a clear understanding of the process which is involved, we can greatly simplify our further discussion if we adopt the word "transfer" as a shorthand expression to describe *both* processes, relinquishment and conferment. The transfer of a claim will then signify either the relinquishment of one's own claim or the conferment of a claim upon another. The preceding situation as it exists before the transfer will almost always show which type of transfer is intended; and any possible ambiguity can be speedily resolved by reverting to the original terms "relinquishment" and "conferment." This use of the word "transfer" will be found to coincide very nearly, if not precisely, with the popular meaning of that term. It will readily be apparent that, since there is no way to confer or to relinquish a duty, there is no way to "transfer" a duty.

34. This is sometimes amplified by averring that the principle of utility requires one's word to be kept inviolate.

See 1 Bentham, Theory of Legislation (1840) 104.

"Why ought we to fullfill our engagements? Because the faith of promises is the basis of society. It is for the advantage of all that the promises of every individual should be faithfully observed. There would no longer be any security among men, no commerce, no confidence;—it would be necessary to go back to the woods, if engagements did not possess an obligatory force. It is the same with these political contracts. It is their utility which makes them binding. When they become injurious, they lose their force . . . it cannot be denied then, that the validity of a contract is at bottom only a question of utility, a little wrapped up, a little disguised, and in consequence, more susceptible of false interpretations."

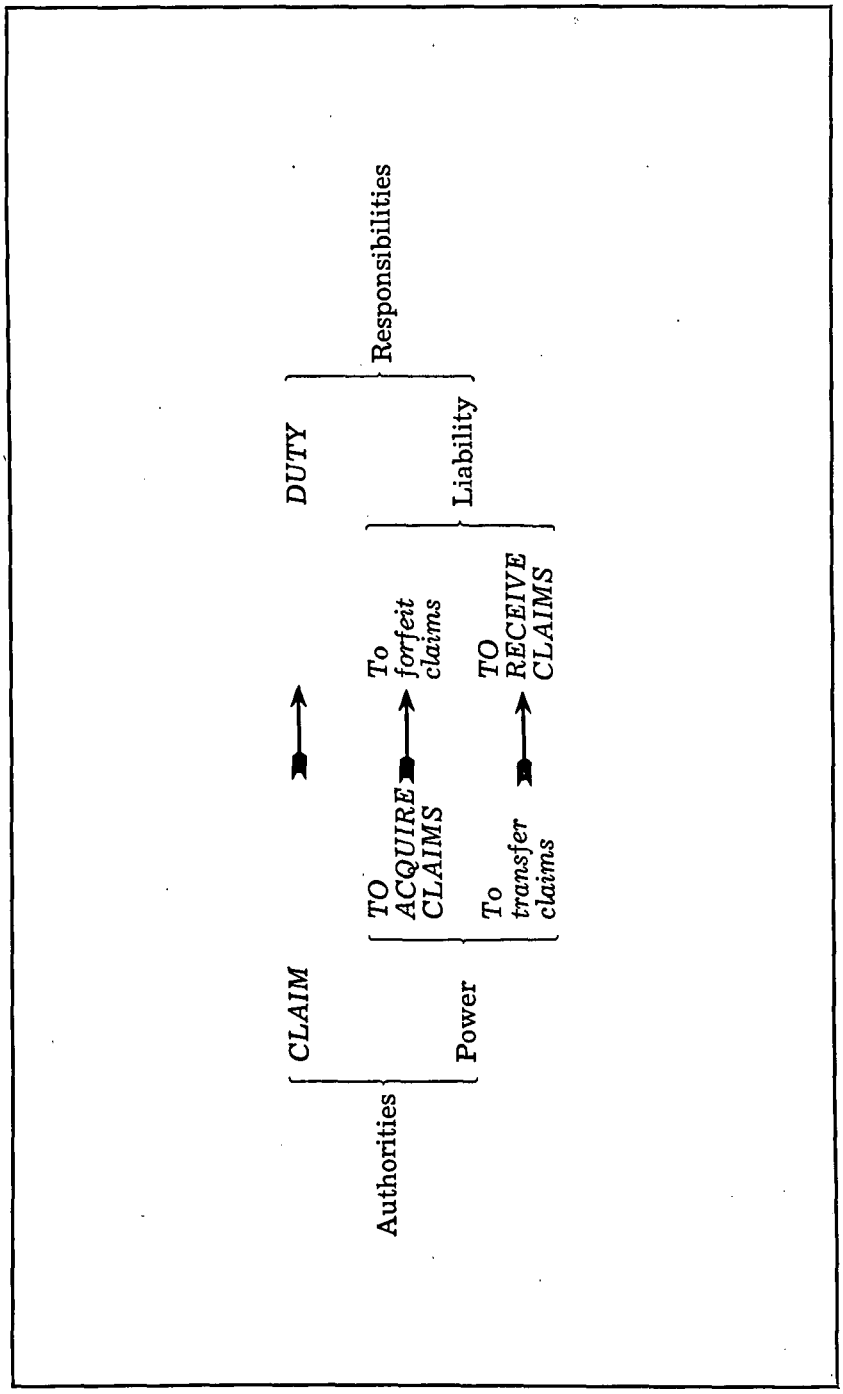
It is possible to arbitrarily divide relations into two groups which might be roughly described as comprising (1) those relations which are of advantage to the holder and (2) those which are of disadvantage to the holder. In order to make the separation methodical, let us adopt as our criterion the following test "does the exercise of the relation enable the holder to have his own preference satisfied, rather than the preference of the other party?" If so, it is a relation of advantage; and, conversely, if not, it is a relation of disadvantage. It is at once obvious that relations of advantage can only lead to an enhancement of the holder's well-being, and that those of disadvantage can only lead to a diminution; but this fact is not of particular importance to our study.

It is clear that all claims are relations of advantage since, by definition, they give the holder the authority to require an act of another person. If the act is performed the preference of the holder is satisfied, and if it is not performed, the claim assures him of an equivalent satisfaction. Thus a claim can only lead to an enhancement of the holder's well-being—a satisfaction of his preference. By the same token, all duties are relations of disadvantage.

While at first scrutiny it might appear that all powers are relations of advantage, further consideration will reveal that powers, unlike claims, have no direct connection with the preference, and thereby the well-being, of the holder. Powers influence the well-being of the holder only indirectly, through the claim-duty relations which they ultimately bring about. We may, therefore, conclude that they are of advantage, or of disadvantage, depending upon whether their exercise will result in the creation of a claim *against* or *in favor of* the holder of the power. This may be expressed somewhat more tersely by stating that (1) Powers to acquire claims from others are relations of advantage, and that (2) Powers to transfer claims to others are relations of disadvantage. Similarly, (1) Liabilities to receive claims from others are relations of advantage and (2) Liabilities to forfeit claims to others are relations of disadvantage.

Not to lose ourselves in the complexities of this situation, we may adopt a tabular method of setting forth the entire matter. The following diagram represents a classification of *all* authority-responsibility relations. Relations of advantage are shown in capitals, while those of disadvantage appear in italics.

In the preceding paragraphs we investigated the method by which a claim may be transferred, and we discovered that the


CLAIM
Authorities
Power
TO ACQUIRE CLAIMS
To transfer claims
To forfeit claims
TO RECEIVE CLAIMS
DUTY
Liability
Responsibilities

individual has a power to transfer any claim whatever. A similar investigation would disclose that this power of transfer extends not only to claims but to all relations of advantage, i. e., to claims *plus* powers to acquire claims. We will, however, dispense with this investigation because it is too tedious to be of interest. To summarize the matter we may state, however, that the individual has *a power to transfer relations of advantage*, and correspondingly has *a liability to receive relations of advantage.*

For the sake of completeness we will now summarize, in tabular form, the authority-responsibility relationships which would logically follow from the postulate we are considering:

Authorities		Responsibilities
A Claim	→	A Duty
1. To exclude the other from affecting one's person or property		1. To refrain from affecting the other's person or property
2. To be made whole for any violation of one's claim		2. To make the other whole for any violation of his claim
A Power	→	A Liability
1. To perform acts		1. To suffer acts
2. To transfer relations of advantage		2. To receive relations of advantage

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It requires no high degree of insight to observe that the system of relations set forth in the foregoing tabulation is the system toward which positive law, in the more enlightened countries, tends to conform.

Without pausing to state the numerous qualifications which may suggest themselves, it is possible to point out in brief fashion

the particular branch of law which is based upon each of these fundamental authorities. The claim to exclude others from one's person is, of course, the basis of the law of personal injuries; just as the claim to exclude from one's productions is the basis of the law of property. Upon the claim to be made whole, we base our law of damages. The power to perform acts has, as its two-fold aspect, the power to create objects, and thus to create property; and at the same time to destroy objects, and thus to commit torts. The power to transfer relations is, rather clearly, the source of contract. Thus, the tabulated relations find their place in the main departments of civil law.

There are, of course, in the positive law, additional relations imposed by the State for specific purposes: But it is difficult to find any instance in which the relations here set forth are not imposed; and it is impossible to find any instance in which the opposite relations are sanctioned. It is, therefore, reasonably clear that the State is striving, for whatever reason, to enforce the very relations that follow from our postulate—that it has, for all practical purposes, decided to proceed on the assumption that the postulate is true.

But *is* it true, or is the assumption of its truth a general error into which all men have fallen? It has been suggested that a partial answer to this question may be found by investigating those instances in which the results produced by the positive law do not coincide with those indicated by the postulate. This may require a word of explanation.

The relations which the State *seeks* to enforce are not the same as those which it actually *does* enforce. Its announced purpose, its statutes and customs, are sometimes successfully evaded in practice. There is, therefore, a difference between the announced purpose of the State (the statutes and customs) and the positive law (the relations which are successfully enforced). The relations set forth in our tabulation correspond to the announced purpose of the State, but do not, in all instances, correspond to the positive law. For example, the relations set forth in the tabulation include the proposition that a claim-duty relationship exists between *A* and *B* under which *A* has a claim that *B* shall refrain from robbing him, and *B* has a duty so to refrain. The announced purpose of the State is to impose a similar relationship on each of its citizens. To some extent it is successful: But certain citizens who commit robberies succeed in avoiding the announced penalties, and their victims fail to receive compensation.

In such cases, the table of relations set forth herein indicates that well-being will shift from the robber to the victim: But the positive law does not shift it. Will it shift in some other way? If it will, and not otherwise, the truth of the postulate will be—in a measure—confirmed, and found to be independent of the positive law; and the attempt of the positive law to conform will be revealed as a necessity of nature, rather than a mere coincidence or caprice.

It therefore becomes desirable to ascertain whether or not well-being will shift in this (and other) cases, in accordance with the tabulation of relations, when the State does not cause the shift. The traditional method of ascertaining this fact would be to conduct an experiment; to have *B* injure *A;* to withhold action by the positive law; and then to observe whether or not *A* was punished and *B* compensated by nature in some other fashion.

Unfortunately, the difficulties which are encountered in measuring the magnitude[35] of conation and affection, and the popular feeling against experimentation in human welfare, unite to bar this field of inquiry. A few scientists have attempted to investigate such problems by statistical methods, hoping that, although no ideal situation can be set up by experiment, they may be able to establish whether robbers, for example, are, in the average instance, punished by nature when for some reason they are not punished by the positive law. All of these investigations, however, are in their early stages, and have not yet advanced far enough to justify any extensive speculation as to their results.

This, then, is a field for future cultivation. If science succeeds in developing a technique for measuring the exact quantum of well-being present in a given individual at a given time, as it can now measure the quantum of matter or energy, it seems reasonable to suppose that our descendants will be able definitely to prove or disprove postulates such as we have here considered; and to discover the correct correlation between conation and

35. We are now able to measure conation and affection as *intensive,* but not as *extensive,* magnitudes. We can tell whether a change in one's well-being, for example, is an increase or a decrease, but we cannot compute the amount which the change represents. In this respect, the measurement of conation and affection stands today about where the measurement of heat stood before Joule discovered the mechanical equivalent of the calorie and thus enabled science to measure heat in terms of ergs, under the well-established gram-centimetre-second system. It is interesting to note that Einstein, by discovering the mechanical equivalent of mass, has since enabled us to measure heat directly in terms of grams. Another Joule, and another Einstein, in another age, may do the same thing for mental phenomena.

affection, if one exists. Such a discovery, more than anything else which can be readily imagined, by placing law among the descriptive sciences, will remove it from the realm of the mystic and the magical. Until the discovery is made, however, the cautious man will hesitate to dogmatize, either way, concerning the feasibility of a natural science of law.